No. 89-1690 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Under the Fourth Amendment principles set forth in United States v. Ross, 456 U.S (1982) 798, is an officer who has probable cause to believe that there is contraband in a specific container within a vehicle required to obtain a search warrant for that container or may the officer search the container for the contraband without a warrant?

2. Relatedly, did this Court's opinion in United States v. Ross, supra, overrule or limit the decision in United States v. Chadwick 433 U.S. 1 (1977)?

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OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three reversing the judgment of the California Superior Court in and for the County of Orange is reported in People v. Acevedo, 216 Cal.App.3d 586, 265 Cal.Rptr. 23 (1989), and appears as Appendix A to the petition for writ of certiorari at pages A-1 through A-21.

The first order modifying the concurring opinion is also reported at 216 Cal.App.3d 586, 265 Cal.Rptr. 23, and appears as Appendix B to the petition for writ of certiorari at pages A-23 through A-25.

The first order modifying the majority opinion is also reported at 216 Cal.App.3d 586, 265 Cal.Rptr. 23, and appears as Appendix C to the petition for writ of certiorari at pages A-27 through A-28.

The second order modifying the concurring opinion is also reported at 216 Cal.App.3d 586 and 265 Cal.Rptr. 23, and appears as Appendix D to the petition for writ of certiorari at pages A-30 through A-31.

The unpublished order of the Supreme Court of California denying petitioner's petition for review on direct appeal was entered in the Official Minutes of that court and reported in the Official Advance Sheets of the California Supreme Court. The minute entry is reproduced in Appendix E to the petition for writ of certiorari at page A-33.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28, United States Code, section 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three, which was entered on

December 12, 1989. The California Supreme Court denied review in this case on March 15, 1990. The petition for writ of certiorari was filed within the required 60 day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on March 15, 1990. (Market Street Railroad Co. v. Railroad Commission, 324 U.S. 548, 550-552 (1944).) Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution. The petition for writ of certiorari was granted on October 1, 1990.

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. The Procedural History

In an information filed by the District Attorney of Orange County, California, on June 24, 1988, respondent and a co-defendant were charged with one count of possession of marijuana for sale in violation of California Health and Safety Code section 11359. (CT 2; JA 1-2.)[1/]

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1. The designation "JA" refers to the joint appendix. The designation "CT" refers to the Clerk's Transcript of the trial court's documents and orders. The designation "RT" refers to the

On this same date, respondent was arraigned in the Orange County Superior Court and entered a plea of not guilty to the charge. (CT 1.) Respondent's motions to suppress evidence and to dismiss the charges pursuant to California Penal Code sections 995 and 1538.5 were heard and denied on October 7, 1988. (CT 77; JA 19-20.)

On October 12, 1988, as part of a plea bargain, the information was amended to add a second count, charging possession of marijuana in violation of California Health and Safety Code section 11357, subdivision (c). Respondent then entered a plea of guilty to both counts. (CT 78; JA 21-27; RT 40-41.)

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reporter's transcript of the trial court proceedings. The clerk's and reporter's transcripts were both included as part of the official record before the California Court of Appeal and California Supreme Court.

On this same date, respondent was granted probation on certain terms and conditions, including 30 days in custody and a $100 fine. (CT 79; JA 21-27.)

Respondent's notice of appeal was filed on November 10, 1988. (CT 83.) In a published decision filed on December 12, 1989, the Court of Appeal, Fourth Appellate District, Division Three, reversed with directions the judgment of the Superior Court and held that the search of the paper bag violated the Fourth Amendment. (Ptn., Exh. A.) Modifications to the opinion that did not change the result were issued on December 20 and 29, 1989, and January 3, 1990. (Ptn., Exhs. B, C and D.) On March 15, 1990, the California Supreme Court denied petitioner's petition for review. (Ptn., Exh. E.)

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B. The Facts Of The Crime

On October 28, 1987, Investigator Don Coleman of the Santa Ana Police Department received a telephone call from United States Drug Enforcement Agent John McCarthy from Hawaii. Agent McCarthy informed Investigator Coleman that Agent McCarthy had seized a package containing a picnic cooler. Inside the cooler the agent had found nine clear bags of marijuana. The bags were approximately 12" by 4" by 3" and each contained about two pounds of marijuana. The package was addressed to a J.R. Daza at 805 West Stevens Avenue, Santa Ana, California. The package was to have been sent to the Federal Express Office at 700 East Alton in Santa Ana. McCarthy told Coleman that the agent would send the package to Coleman instead. The intent of the officers was to arrest the person who

picked up the marijuana. (CT 64, 71; JA 4, 13-14; RT 20.)

McCarthy sent the package to Coleman, who received it on October 29, 1987. Coleman opened the package and found the marijuana in the manner Agent McCarthy had described. Investigator Coleman repackaged the box. He then contacted Mike Cole, the Senior Operations Manager at the Federal Express Office. Coleman told Cole that Coleman wanted to leave the package at Federal Express and then arrest the person who picked it up. Cole took the package and kept it under lock. (CT 64, 71; JA 4, 14; RT 20.)

The next day, October 30, 1987, Investigator Coleman went back to the Federal Express Office. He examined the package containing marijuana. The package was still under lock. It had not been tampered with. The wrapping was the same. A small mark Coleman had placed on the

package was still there. (CT 64, 71; JA 14; RT 20.)

A telephone number, apparently on the delivery instructions from the shipper, was checked through the Santa Ana Police Department facilities and found to belong to a Jamie R. Daza at 807 West Stevens, Apartment #12 in Santa Ana. A check of Daza's California driver's license confirmed this same address. On October 30, 1987, at about 10:30 a.m., a man who identified himself as Jamie Daza went to the Federal Express Office and picked up the package. Daza placed the package into his vehicle and drove to his apartment on West Stevens. He carried the package into the apartment. (CT 64, 71; JA 5, 15-16; RT 20.)

Around 11:45 a.m., surveilling officers saw Daza exit his apartment and drop the paper and box that had contained the marijuana into a trash bin. (CT 65;

JA 5; RT 3.) At this time Investigator Coleman left the scene to get a search warrant. (CT 65; JA 5; RT 3.)

Around 12:10 p.m., co-defendant St. George was seen by officers exiting the residence wearing a blue knapsack. The knapsack appeared to be half full. Fearing the loss of evidence, the officers stopped and detained him after he had left the apartment as he tried to drive out of the complex. The knapsack was searched and 1 and 1/2 pounds of marijuana was found. (CT 65; JA 5; RT 4.)

Around 12:30 p.m., respondent arrived at the scene. He walked to apartment 12 and entered. Respondent had nothing in his hands. He exited about ten minutes later carrying a brown lunch bag that appeared to be full and of the appropriate size of the wrapped marijuana packages that Agent McCarthy had seen. Respondent was then observed to leave the apartment

and walk to a silver Honda in the parking lot. He placed the brown lunch bag into the trunk of the Honda and then attempted to leave. In order to prevent the possible loss of evidence from the apartment under surveillance, respondent's vehicle was stopped by a marked police car. The trunk was opened, as was the bag, and inside the brown bag the officers found 1/4 to 1/2 pound of marijuana. (CT 65; JA 6-7.)

The search warrant issued at 12:40 p.m. (JA 12.) Shortly thereafter Investigator Coleman returned with a search warrant. The apartment was searched and numerous bags of marijuana were found. (CT 71, 74.)

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SUMMARY OF ARGUMENT

In United States v. Ross, 456 U.S. 798, 823 (1982), the Court specifically held that under the Fourth Amendment, once probable cause exists to believe that somewhere in a vehicle there is contraband, the entire vehicle may be searched without a warrant and the

> "scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (United States v. Ross, supra, at 823.)

Even closed containers found in a vehicle in such a search may be seized and searched. (Id.) However, in the case at bar, the California Court of Appeal, relying on United States v. Chadwick 433 U.S. 1 (1977), held that since the officers had particularized probable cause relating to a closed container before that container was placed into the vehicle, the officers had the right to seize the bag

but needed a search warrant to open it. Such a ruling cannot be justified in light of the Court's holding in Ross.

In Ross the Court recognized two related policy considerations were involved in every vehicle search: The inherent mobility of a vehicle, and a lesser expectation of privacy that surrounds a vehicle and its contents because the vehicle is subject to pervasive and continuing governmental regulation. Both of these rationales fully apply in the case at bar. When Mr. Acevedo placed the bag of drugs in the vehicle it attained the same degree of mobility as the vehicle and was in an area subject to a lesser expectation of privacy. As such, given probable cause to believe that the vehicle contained a bag and that bag contained illegal drugs, the officers could seize it and search it without a warrant. The rules promulgated

by the Court in Ross should fully cover the case at bar. No distinction should be made based on whether there was preexisting probable cause as to the container before it was placed into the vehicle.

Adoption of such a bright line rule is necessary to resolve the overly confused and complex situation now faced by police officers who are forced to determine if they have particularized or unparticularized probable cause in dealing with a container found in a lawfully stopped vehicle thought to be involved in transportation of narcotics, illegal drugs or other contraband.

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ARGUMENT

SINCE THE OFFICERS HAD PROBABLE CAUSE TO BELIEVE THE PAPER BAG FOUND IN THE TRUNK OF RESPONDENT'S VEHICLE CONTAINED ILLEGAL DRUGS, THEY DID NOT NEED A SEARCH WARRANT TO OPEN THE BAG AND SEARCH IT

In United States v. Ross, 456 U.S. 798, 823 (1982), the Court specifically held that under the Fourth Amendment, once probable cause exists to believe that somewhere in a vehicle there is contraband, the entire vehicle may be searched without a warrant and the

> "scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (Id., at 823.)

Thus, even closed containers found in a vehicle in such a search may be seized and searched. (Id.)

No separate rule should apply simply because the probable cause centered on one of the closed containers before it was placed into the car. Once the closed

container was placed into the vehicle it attained the same degree of mobility as the vehicle itself. Additionally, by placing the bag into an area subject to a lesser expectation of privacy, respondent relinquished any expectation of privacy he had concerning the contents of the bag. The Court's decisions make clear that given the mobility of the bag in the vehicle and given the reduced expectation of privacy surrounding the vehicle, the probable cause justified a search of the bag without a warrant.

The Court has repeatedly recognized two intertwined rationales that are involved in every vehicle search: The inherent mobility of the vehicle and a lesser expectation of privacy that surrounds that vehicle and its contents because the vehicle is subject to pervasive and continuing governmental regulation. The development of these two

concepts dates from the earliest vehicle search cases decided by the Court. Both of these rationales existed and applied to Mr. Acevedo's vehicle and it's contents, and fully supported the warrantless search of the bag of contraband that Mr. Acevedo had placed into the trunk of his car.

A. The Inherent Mobility Associated With A Vehicle Justifies A Complete Search If There Is Probable Cause

Acknowledging an indisputable need for clarification in the law of vehicle searches, in United States v. Ross, supra, 456 U.S. 798 and California v. Carney, 471 U.S. 386 (1985), the Court traced the origins of the vehicle exception and carefully examined the basis for the exception.

In particular, the Court examined the decision in Carroll v. United States, 267 U.S. 132 (1925), and its historical background. (United States v. Ross, supra, at 804-809.) The court in Ross

found that it is consistent with the Fourth Amendment's concerns for preserving the public interests as well as the rights of the individual to allow the warrantless search of a motor vehicle, when the search is undertaken with probable cause to believe the vehicle contains that which is subject to seizure. (United States v. Ross, supra, 456 U.S. at 805; Carroll v. United States, supra, 267 U.S. at 149.)

The Court has repeatedly made it clear that the vehicle exception announced in Carroll is based in large part upon the inherent and obvious difference between an vehicle and a structure--the ability to move. In Carney, the Court recognized that a vehicle's

> "capacity to be 'quickly moved' was clearly the basis of the holding in Carroll, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception." (California v. Carney, supra, 471 U.S. at 390.)

In Chambers v. Maroney, 399 U.S. 42, 51 (1970), the Court commented on the rationale for the vehicle exception to the Fourth Amendment by noting that "the opportunity to search is fleeting since a car is readily mobile." (Id.) Later, in South Dakota v. Opperman, 428 U.S. 364, 367 (1976), the Court noted that this inherent mobility of automobiles "creates circumstances of such exigency that, as a practical necessity rigorous enforcement of the warrant requirement is impossible." (Id.) More recently, in Ross the Court held that an immediate intrusion was justified because of "the nature of an automobile in transit . . ." (United States v. Ross, supra, 456 U.S. at 806.) Finally, in Carney the Court noted that this potential for mobility generates the problem that "Absent the prompt search and seizure, [the vehicle] could have readily been moved beyond the reach of the

police." (California v. Carney, supra, 471 U.S. at 393.) Thus, the Court concluded that the vehicle exception to the Fourth Amendment's warrant requirement historically turned on the ready mobility of the vehicle and on the presence of the vehicle in a setting that objectively indicated that the vehicle was being used for transportation. (Id., at 394.)

In the case at bar, once the bag filled with contraband was placed into the automobile, it acquired the same degree of mobility as the vehicle itself. Once placed in the car, it had the same ability to be rapidly moved away from the area as much as any other item inside of or attached to the car. Indeed, it had the same exact degree of mobility as the closed brown bag found in the trunk of the defendant's vehicle in Ross. As noted by Justice Blackmun in his dissent in Arkansas v. Sanders, 442 U.S. 753, 769

(1979), "The luggage, like the automobile transporting it, is mobile." Respondent's independent and intentional action of placing the bag into the vehicle showed an intent to move the bag from its original location. His act of driving the vehicle was a demonstration of the precise mobility that justified the searches in Ross and Carroll. Given such a clear demonstration of mobility, the exigent circumstances of mobility encompassed the bag itself and no search warrant was required.

> "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (United States v. Ross, supra, 456 U.S. at 809.)

Therefore, once Mr. Acevedo placed the paper bag into the trunk of the vehicle it attained the same degree of mobility as the vehicle itself. Like the

vehicle, it had the potential for mobility, the potential to rapidly move beyond the reach of law enforcement. Like the bag in the trunk of the vehicle in Ross, since there was probable cause to believe it contained illegal drugs, the officers did not need a warrant to search it.

B. The Lesser Expectation Of Privacy Given To A Vehicle Also Justifies The Search Of The Bag Of Illegal Drugs Found Within the Vehicle

The ability of the police to conduct a probable cause based search of a vehicle is not limited to the fact of its mobility.

The Court has also noted that since moving vehicles are "justifiably the subject of pervasive regulation by the State" there is a lesser expectation of privacy for the occupant. (New York v. Class, 475 U.S. 106, 113 (1986); California v. Carney, supra, 471 U.S. at

391.) The reduced expectation of privacy derives not so much from the fact that portions of the vehicle may be in plain view as from the pervasive regulation of vehicles by the government. (California v. Carney, supra, 471 U.S. at 392.)

In South Dakota v. Opperman, supra, 428 U.S. at 368, the Court held that this pervasive regulation of vehicles covers hundreds of aspects of the vehicle's physical structure as well as its operation. As a result of these laws, it is a common everyday occurrence that police stop and examine vehicles to ascertain compliance with the myriad of regulations. (Id.) The extent of the regulation is so great, the Court has referred to it as a "web of pervasive regulation." (New York v. Class, supra, 475 U.S. at 112.)

So well known is the regulatory scheme, that the Court has stated, "The

public is fully aware that it is accorded less privacy in its automobiles. . . ." (California v. Carney, supra, 471 U.S. at 392; accord New York v. Class, supra, 475 U.S. at 113.) Moreover, because of these regulations, individuals have always been on notice that a movable vehicle may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrates's prior evaluation of those facts. (United States v. Ross, supra, 456 U.S. at 806, fn. 8.)

Moreover, the Court has noted that given the existence of probable cause to believe a vehicle contains contraband, any expectation of privacy is even further diminished.

> "In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is

> transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." (United States v. Ross, supra, 456 U.S. at 823.)

Thus, in the case at bar, when Mr. Acevedo placed the paper bag filled with contraband into the trunk of the car, he was on notice and aware that he was placing the bag into an area involving a reduced expectation of privacy. Whatever privacy concerns he may have subjectively evidenced by placing the contraband into a bag were dissipated by his act of placing the bag into an area involving a known reduced expectation of privacy. Once the bag was placed in the car, it was subject to the rules set forth by the Court in Ross. Indeed, Mr. Acevedo's paper bag was in the same position as the paper bag in the trunk of the vehicle in Ross in respect to the key factors of mobility and privacy.

The factors of mobility and a lesser expectation of privacy both apply to the bag of illegal drugs that Mr. Acevedo had placed into his trunk. Mr. Acevedo's act of driving the vehicle was the precise mobility that justified the searches in Ross and Carroll. By placing the bag into the vehicle, Mr. Acevedo had subjected it to a lesser expectation of privacy as in Ross and Carney. Given the exigent circumstance of mobility that encompassed the bag itself and given the lesser expectations of privacy that were involved, no search warrant was required. The bag was in the same position as each of the closed containers searched in Ross.

> "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (United States v. Ross, supra, 456 U.S. at 809.)

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C. The Rule Announced In Ross Should Apply To This Case

The Court's holding in United States v. Chadwick, 433 U.S. 1 (1977) was premised on policy determinations now rejected by the Court in vehicle search cases. As such, the interpretation of the Fourth Amendment announced in Ross should apply to the search of the closed container of drugs in this case.

The California Court of Appeal in the case at bar held that a warrant was needed for the search of the closed container based on this Court's holding in United States v. Chadwick, supra, 433 U.S. at pages 13-16. It is, of course, true that in Chadwick, this Court invalidated the search of a 200 pound footlocker that had been placed into a vehicle's trunk. However, Chadwick is readily distinguishable as it was not argued or decided as a vehicle search case. The basis of the ruling was a rejection of the

government's claim that since the footlocker itself could be moved, it always had the same inherent mobility as a motorized vehicle. (United States v. Chadwick, supra, 433 U.S. at 13.) There was no argument that the search of the footlocker was justifiable because it had been placed into a vehicle by its owners. (Id., at 11-12.) It is important to note that at the first suppression hearing in the Federal District Court in Chadwick the federal government had argued "that as the vehicle itself could have been searched without a warrant, so also could the footlocker, as part of its contents." (United States v. Chadwick, 532 F.2d 773, 778 (1st Cir. 1976).) The government did not pursue that theory upon petitioning the district court for reconsideration, before the Court of Appeals, or before this Court. Indeed, this Court specifically noted in its opinion that,

> "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search. . . ." (United States v. Chadwick, supra, 433 U.S. at 11-12.)

Thus, the result in Chadwick is distinguishable because in this case the State of California has contended from the beginning that Mr. Acevedo's act of putting the bag in the trunk of the vehicle subjected the bag to the vehicle exception to the Fourth Amendment.

Moreover, the rationale for the decision in Chadwick has been undercut by the subsequent holdings of the Court. In Chadwick, the Court's opinion turned on the expectation of privacy in the closed container and on the fact that once the government had seized the footlocker, it was unreasonable not to obtain a warrant. (Id., at 13-16.) But in Ross, the Court recognized that even if a citizen exhibited a reasonable subjective

expectation of privacy in a closed container, that expectation dissipated when the container was placed in a vehicle and there is probable cause to believe there is contraband in the container. (United States v. Ross, supra, 456 U.S. at 823: accord United States v. Johns, 469 U.S. 478, 484 (1985).) Thus, the first underpinning of Chadwick is no longer good law as to a closed container that is placed inside a vehicle, as it is based upon policy considerations now rejected by the Court.

Additionally, in recent years, the Court has repeatedly rejected the assertion that when police have probable cause to search a closed container in a vehicle, once they seize that container and take it into their possession nullifying its ability for movement, they must then obtain a warrant before opening it. (United States v. Johns, supra, 469

U.S. at 486-487; Michigan v. Thomas, 458 U.S. 259, 261 (per curiam 1982); Florida v. Meyers, 466 U.S. 380, 382 (per curiam 1984).) As the Court stated, "the justification to conduct such a warrantless search does not vanish once the car has been immobilized." (Florida v. Meyers, supra, at 382.) Thus, the second and only remaining underpinning of Chadwick is also based on policy considerations no longer accepted by the Court. Therefore, the holding in Chadwick should have no application to the case at bar. Chadwick was not an automobile search case at all. It was never argued or decided as such. Moreover, the policy considerations supporting the decision in Chadwick have since been rejected by the Court. Thus, no aspect of the decision in

Chadwick should affect the outcome in this case.[2/]

It is not rational to make the distinction between whether a search warrant should be obtained based upon whether or not the officers had sufficient knowledge that the contraband was in a specific container in a specific part of the vehicle as opposed to being in the vehicle generally. As Professor LaFave

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2. Similarly, the Court's decision in Arkansas v. Sanders, supra, 442 U.S. 753, was premised both on Chadwick and on a finding that a suitcase, after its seizure from a vehicle but before its search, no longer had any mobility. (Id., at 762 and 763.) However, since then the Court has rejected such an analysis, holding that the essential factors are the mobility and decreased expectation of privacy at the moment of the seizure. (United States v. Ross, supra, 456 U.S. at 807 fn. 9 and 809-817; United States v. Johns, supra 478 U.S. at 487-488.) Thus, although the Court has indicated in a footnote that Sanders has survived Ross (United States v. Place, 462 U.S. 696, 701 fn. 3 (1983)), such an aside, devoid of any analysis, is not supported by a careful examination of the policy considerations in Ross in respect to vehicle searches.

has noted, such a holding would mean that police officers may actually be able to broaden their power to make warrantless searches by limiting their accumulation of probable cause. (LaFave, Search and Seizure, Second Edition, Section 7.2(d), page 58 (1987).) Indeed, even the California Court of Appeal recognized the "anomalous nature of the Ross-Chadwick dichotomy; . . . ." (People v. Acevedo, 216 Cal.App.3d 586, 592, 265 Cal.Rptr. 23 (1989).) The California court noted that it was creating an "incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of Ross." (Id., at 592) The purpose of the exclusionary rule is to encourage future police conformance with the dictates of the Fourth Amendment, not to reward them for creative avoidance. Yet a holding that more particularized

probable cause requires a warrant encourages such inappropriate behavior.

Such a rule not only flies in the face of logic but is also clearly contrary of the stated desire of the Court to formulate straightforward, workable rules regarding the searches of vehicles, so that police officers can make proper decisions regarding the search of vehicles. (New York v. Belton, 453 U.S. 454, 458 (1981).) The Court has held that,

> "'a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (Id., at 458, quoting Dunaway v. New York, 442 U.S. 200, 213-214 (1979).)

The need for straightforward and predictable rules is in the interest of both the police and the citizens who may be subjected to police activity. (Id., at 459-460.)

The rule formulated in Ross is clear, logical and should be applied to the situation in the case at bar. A rule requiring a warrant when there is particularized probable cause will further cloud what the Court described in Ross as "this troubled area." (United States v. Ross, supra, 456 U.S. at 817.) Instead of the straightforward rule of Ross, which looks to the overall existence of probable cause to search the vehicle and its contents, endless litigation over whether the officer knew of the location and container of the contraband will be inevitable. A far more workable rule is the holding in Ross that if

> "probable cause justifies the search of a lawfully stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." (United States v. Ross, supra, at 825.)

Such a rule establishes the exact type of "bright line" the Court has sought to

assist peace officers in their difficult tasks. Thus, the Court's earlier decision in United States v. Chadwick, supra, 433 U.S. 1, should be held to be inconsistent with and to have been overruled by Ross in situations such as the one in the case at bar.

Moreover, adherence to the Ross-Chadwick dichotomy as was attempted by the California Court of Appeal in the case at bar, creates severe difficulties for peace officers in the performance of their duties. In a situation where officers have sufficient justification to stop a vehicle for transporting narcotics or other illegal drugs in a particular container within that vehicle, what are the officers to do with the citizens while they go through the often lengthy and laborious task of obtaining a warrant? The officers could assume that since they have probable cause to believe that there

are illegal drugs in the container, they also have probable cause to arrest the driver. But such a course of action forces the officers to immediately commit themselves to a significant intrusion into a citizen's personal privacy, an arrest. In the alternative, the officers could decide to withhold the decision on the arrest until the bag is opened with the warrant. However, that course of action inherently includes a different significant intrusion into the citizen's personal privacy rights. It would require a long detention of the citizen as well as the container and the vehicle.[3] One of the problems with such a lengthy detention is that at some point the detention

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3. Of course, in Chambers v. Maroney, supra, 399 U.S. at page 52, this Court recognized that if an officer has the right to seize a vehicle and hold it while a search warrant is obtained, the officer has the right to immediately search the vehicle without a warrant as well.

becomes an arrest. (Florida v. Royer, 460 U.S. 491, 501-502 (1983).) Thus, while the officers are trying to obtain a warrant they may run the very real risk of inadvertently arresting a citizen before the contraband is actually found. Thus, the existing rule leaves the officers the Hobson's choice of doing nothing or taking action that amounts to a significant intrusion into a citizen's personal rights of privacy. Allowing the officers to search the closed container at the scene, allows a speedy resolution of the situation with only a minor intrusion in the citizen's personal privacy rights, a brief delay and a quick limited search. The holding in Ross is a far better rule. Officers can quickly resolve the situation, promptly arresting criminals while speedily allowing law abiding citizens to proceed on their way. The rule created by Chadwick-Sanders will

ensnare officers and citizens in time consuming and unnecessary waits for the procuring of warrants or in unneeded, perhaps premature arrests.

In Ross the Court recognized that delaying the opening of a container found in a vehicle raised "practical considerations" as to what to do with the vehicle itself while the search warrant was obtained. (United States v. Ross, supra, 456 U.S. at 822.) That same practical problem exists in the case at bar. If the suspected container turns out to have drugs or other contraband in it, then the vehicle itself has been used for transportation of that contraband and is seizable as well. If the officers have reason to believe a specific container in the vehicle contains contraband, it is reasonable for them to believe that a full search may turn up more than just what is in the closed container. (United States

v. Mazzone, 782 F.2d 757, 761 (7th Cir. 1986); United States v. Shepherd, 714 F.2d 316, 319-320 (4th Cir. 1983).) But if the officers decide to delay arrest until the container is opened, the police may have to hold the vehicle in some safe and appropriate manner until the warrant has been obtained, served and executed. Thus, not only will the citizens have to be detained but so will their vehicles. Moreover, the officers guarding the citizens, the officers guarding the vehicle and the officers off seeking the warrant will be unavailable for any other form of police work. As Justice Powell noted in his concurring opinion in Robbins v. California, 453 U.S. 420, 433-434 (1981),

> "Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. . . . The aggregate burden of procuring warrants

> whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." (Robbins v. California, supra, at 433-434.)

As already discussed, given the presence of the bag in the vehicle and given the existence of probable cause, there is no reasonable privacy interest involved in the search in the case at bar. Thus, given the practical considerations including the loss of scarce law enforcement resources and the storage problems created both by the detained vehicles and closed containers, the Court should not require a warrant simply because the probable cause arose before the closed container was placed into the car. The Court should hold that the rules announced in Ross govern and uphold the warrantless search of Mr. Acevedo's drug filled bag.

Failure to reject the implications of Chadwick leaves an almost imponderable task to police officers in the field confronting rapidly changing situations. An officer must decide whether he or she has unparticularized probable cause as to an entire vehicle or particularized probable cause as to a container within the vehicle. While such determinations may be the delight of seasoned appellate attorneys, police officers have neither the legal background nor the requisite time to ponder such involved and complicated questions. Given the fact that courts may reach opposite conclusions on virtually identical fact patterns (compare State v. Borotz, 654 S.W.2d 111, 113, and 115-117 (Mo. App. 1983) with United States v. Salazar, 805 F.2d 1394, 1397 (9th Cir. 1986)), how can a police officer be expected to make a proper

determination in the field as events are rapidly unfolding?

Moreover, as Justice Blackmun noted in his dissent in United States v. Chadwick, supra, 433 U.S. at page 20, requiring officers to obtain a warrant in such a situation does nothing to protect traditional "Fourth Amendment values." Since there is no question probable cause exists to believe there is contraband in a closed container, in virtually all cases a search warrant will be issued.

> "I therefore doubt that requiring the authorities to go through the formality of obtaining a warrant in this situation would have much practical effect in protecting Fourth Amendment values. [Footnote omitted.]" (United States v. Chadwick, supra, 433 U.S. at 20.)

The point is particularly true since this case involves a location where there is a sharply lower expectation of privacy. Forcing the officers to obtain a warrant would seem more of an overall detriment to

society since those officers will be unavailable for other law enforcement purposes for significant periods of time.

Since the facts of this case reveal that there was probable cause to believe that respondent's vehicle contained contraband, the rationale of Ross should apply. That decision flatly supports the validity of a search of every part of the vehicle, including any closed containers in the car. When the closed container was placed into the vehicle by the respondent, it became as moveable as the vehicle and subject to the lesser expectations of privacy surrounding cars. Thus, the exigent circumstances covering the vehicle applied to the paper lunch bag as well. Thus, the California Court of Appeal erred in failing to uphold the search of the bag without a warrant.

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D. Even If Chadwick Still Has Some Validity, The Search Of Mr. Acevedo's Vehicle Was Nevertheless Valid

Even assuming arguendo that Chadwick somehow still has some measure of validity, the warrantless search of the bag in this case was still valid. Once Mr. Acevedo placed the bag into the trunk of his vehicle and once he had commenced movement of his vehicle, the officers had probable cause to believe that Mr. Acevedo was using his vehicle to commit the felony crime of transportation of contraband. (Cal. Health & Saf. Code, § 11360.) The vehicle itself was evidence of this new crime and could be searched under Ross. Moreover, since respondent had been involved in the felony of transportation of drugs, he was going to be taken into actual custody. The vehicle would have been either seized as evidence or impounded. Following the seizure the bag would inevitably have been searched during

the inventory search lawfully conducted by the police. (Colorado v. Bertine, 479 U.S. 367, 371-376 (1987); Illinois v. Lafayette, 462 U.S. 640, 643-648 (1983); People v. Miranda, 44 Cal.3d 57, 80-82, 241 Cal.Rptr. 594, 744 P.2d 1127 (1987).) This case presents the scenario predicted by Justice Blackmun in his dissent in Chadwick.

> "But if the agents had postponed the arrest just a few minutes longer until the respondents started to drive away, then the car could have been seized, taken to the agents' office, and all its contents--including the footlocker--searched without a warrant. [Footnote omitted.]" (United States v. Chadwick, supra, 433 U.S. at 22-23.)

The problem with utilizing such a limited formulation for future cases is that it unnecessarily puts both police and innocent bystanders at risk because it delays the ability of the police to react until criminals have been given a means and an actual opportunity to begin to flee

in a vehicle. Such a situation encourages attempts to evade arrest and will often lead to high speed chases, horribly dangerous to all participants. (Id., at 24, fn. 6.) To avoid such a life threatening result, the Court should hold that the act of placing the closed container into the car, under circumstances making it appear that the vehicle is about to be driven off, gives rise to probable cause to believe the vehicle is being used for transportation of contraband. At that point, the vehicle itself becomes evidence of the crime and can be seized and searched as discussed above.

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CONCLUSION

The Court should adopt a bright line rule that will finally put to rest nearly 65 years of litigation involving the search of vehicles. If there is probable cause to believe there is contraband in a vehicle, or probable cause to believe that there is contraband in a particular container within a vehicle, then a search without a warrant is proper. The two controlling principles the Court has identified as being involved in every vehicle search were fully present for the search of Mr. Acevedo's vehicle: The mobility of the vehicle and its contents and the diminished expectation of privacy surrounding a vehicle. The mere fact that the probable cause centered only on one closed container before it went into the car does not diminish the scope and effect of either of these key variables.

The Court should hold that the Fourth Amendment principles it set forth in Ross and Carney govern the search of the car in the case at bar and no search warrant was required. Such a bright line rule will give needed guidance to police officers in the performance of their law enforcement functions and at the same time protect individual rights.

For the foregoing reasons, the judgment of the California Court of Appeal, Fourth Appellate District, Division Three, should be reversed.

DATED: November 8, 1990.

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No: 89-1690
October Term, 1990

STATE OF CALIFORNIA

Petitioner,

v.

CHARLES STEVEN ACEVEDO

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF ON THE MERITS as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 8th day of November, 1990.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 8, 1990.

Robin Dunham
ROBIN DUNHAM

Subscribed and sworn to before me
this 8th day of November, 1990.

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93

Anne Marie Buford
Notary Public in and for said County and State